
(2017) 11 AHC CK 0019
In the Allahabad High Court
Case No : 286 of 2007

Ramakant Tiwari

APPELLANT

Vs

State Of U.P., & Ors.

RESPONDENT

Date of Decision : 09-11-2017

Acts Referred:

Citation : (2017) 11 AHC CK 0019

Hon'ble Judges : Bharati Sapru, Sangeeta Chandra

Bench : Division Bench

Advocate : P.N. Ojha, Ashok Khare

Judgement

1. This special appeal has been filed by the appellant challenging the judgment and order dated 12.2.2007 passed by Hon"ble Single Judge in Writ Petition No. 30455 of 1990 (Ramakant Tiwari Vs. State of U.P & others). By means of the impugned order dated 12.2.2007, the Hon"ble Single Judge has dismissed the writ petition and has held on the basis judgments of the Hon"ble Supreme Court that the Principle of restitution shall be applicable and it was the duty of the Court to restore back the benefits to the respondents which were given to the petitioner in pursuance of an interim order dated 19.11.1990 staying the operation of the order of dismissal of the petitioner no.1 dated 1.11.1990. The writ petition was dismissed with cost.

2. Counsel for the petitioner / appellant while arguing the matter before us has relied upon three main grounds, which were also urged before the learned Single Judge. It has been argued that during the pendency of the disciplinary proceedings the petitioner who had initially been appointed on a temporary basis, had completed his probation satisfactorily and having rendered satisfactory service and being confirmed, it cannot be said that during the same time, the petitioner committed any misconduct and disciplinary proceedings could not be allowed to continue after his confirmation.

3. Learned Single Judge has dealt with the said argument raised by the writ

petitioner and has held that the reliance placed upon the judgment of the Hon'ble Supreme Court in the case of *Girish Bihari Vs. State of U.P.* 1982 LIC 1500 was misplaced.

4. It is admitted fact that the judgment rendered in the case of *Girish Bihari* (supra) related to a matter of promotion and the writ petitioner therein had been promoted during the pendency of disciplinary proceedings, and therefore, the said case was clearly distinguishable on facts. Learned Single Judge has rightly held that the petitioner was appointed on a temporary basis as Excise Inspector on 22.8.1983 and departmental proceedings had been initiated during his period of probation and were pending against him and charge sheet had been served, but enquiry report had not been submitted and no final orders were passed. Therefore, on the date of confirmation of the petitioner, who was on probation, it was not certain as to whether the petitioner was guilty of misconduct or not, hence, to avoid any complication and undue hardship for the petitioner, he was confirmed during pendency of disciplinary proceedings.

5. We have considered the view of the learned Single Judge and we find that the department had acted in favour of the petitioner, while confirming him, during the pendency of the disciplinary proceedings and by mere confirmation, it cannot be said that the employee, who was otherwise facing disciplinary proceeding was absolved of all misconduct. The charge of misconduct had yet to be proved and the petitioner would certainly have suffered in terms of the seniority and further chances of promotion, in case his confirmation was held back by the Authorities till he was exonerated. The confirmation order of the petitioner during the pendency of the disciplinary proceedings only shows bonafide conduct of the employers.

6. This Court may at this stage refer to judgments rendered by the Hon'ble Supreme Court in matters relating to compulsory retirement. It had earlier been held that promotion of an employee would mean that the work and conduct of such employee was satisfactory, but the Supreme Court in *State of Punjab Vs. Guru Dev Singh* 1998 (4) SCC 92 and again in *State of U.P. Vs. Vijay Kumar Jain* 2002 (3) SCC 641 and in *State of U.P. Vs. Lalsaram* 2001 (3) SCC 389 have held that mere promotion of an employee would not render the whole service tenure of the employee concerned as satisfactory, and adverse entries even before promotion can be taken into consideration for the purpose of compulsory retirement.

7. Counsel for the petitioner / appellant has next argued that it was not open for the Inquiry Officer to initially file an enquiry report dated 30.9.1989 finding only charge no. 1 as fully proved and charge no.2 as partially proved and thereafter issue another notice on 26.9.1990, fixing 17.8.1990 as a date for submitting his reply to the said notice. It was argued that copies of Panchnama and other documents that were sent alongwith such notice were illegible. When the petitioner objected, a fresh date was fixed by the Enquiry Officer and a supplementary enquiry report dated 11.9.1990 was submitted holding the

petitioner guilty of the second charge also mentioned in the charge sheet.

8. It has been argued by learned counsel for the petitioner / appellant on the basis of judgment rendered in the case of K.R. Deb Vs. Collector Central Excise AIR 1971 SC 1447 that the Disciplinary Authority had enough powers to reconsider the evidence brought on record in the first enquiry report and to come to its own conclusion under the Rule. Instead of the Appointing Authority, the Excise Commissioner, making any order for further enquiry by the Inquiry Officer, the Inquiry Officer took upon himself to inquire further into the matter and found charge no.2 also proved against the petitioner / appellant.

9. Leaned Single Judge, while considering the judgment in the case of K.R. Deb (supra) has come to the conclusion that in the said case instead of asking the Inquiry Officer to further enquire into the matter, the Collector had appointed another Enquiry Officer to inquire into the charge after the earlier Enquiry Officer had reported in favour of the delinquent employee. The Supreme Court had held that Rule 15 of the Classification Control and Appeal Rules did not contemplate successive enquiries and there was no provision for setting aside the earlier enquiry report without giving any reason whatsoever.

10. The Hon'ble Single Judge came to a conclusion that instead of the judgment in K.R. Deb (supra) buttressing the argument of the petitioner, it ran counter to the submission of the learned counsel for the petitioner as the said judgment holds that it was possible for the Disciplinary Authority to ask the Inquiry Officer to record further evidence. This had happened in the case of the petitioner / appellant since the Inquiry Officer had in his earlier enquiry report found the charge no.2 to be partially proved only on the ground that documentary evidence viz Panchnama etc., was not available. Later, the said Panchnama became available, having been sent by the Excise Commissioner, Karnataka. The Inquiry Officer made further enquiry on the basis of the said material and submitted a supplementary enquiry report. In the absence of any Rule prohibiting the Inquiry Officer from further enquiring into the matter, the disciplinary proceedings, could not have been said to be vitiated only for this reason.

11. This Court has considered the observations of the Hon'ble Single Judge on this point and does not find the same to be suffering from any factual or legal infirmity.

12. In the case of Union of India & others Vs. P. Thayagarajan 1999 (1) SCC 733, the Supreme Court has considered the judgment rendered in the case of K.R. Deb (supra) and has observed that in the case of K.R. Deb, the Supreme Court held that if in a particular case, where there has been no proper enquiry because of some serious defect having crept into the enquiry or some important witnesses were not available at the time of enquiry or were not examined, the disciplinary authority may ask the Inquiry Officer to record further evidence, but that provision would not enable the disciplinary authority to set aside the previous enquiries on the ground that the report of the enquiry officer does not

appeal to the disciplinary authority. Clearly in the case at hand before us, initially an enquiry report was submitted, in which one of the charges was found proved and with regard to other charge, the Inquiry Officer had expressed his inability to give a finding because of unavailability of copies of Panchnamas made by the Excise Authorities of Karnataka State. Later on, copies of all these Panchnamas became available and therefore the Inquiry Officer proceeded to conduct further enquiry and gave due opportunity of hearing to the petitioner-appellant before submitting a supplementary report.

13. The third point raised by learned counsel for the petitioner / appellant before us also is with regard to the merits of his case and his allegation that reasonable opportunity of hearing was denied to him as the documents that were additionally supplied by the Inquiry Officer were not legible.

14. Learned Single Judge, while dealing with the said argument has come to a conclusion that the additional documents that were later on supplied in pursuance of fresh notice issued to the petitioner on 26.7.1990 were in fact, copies of Panchnamas and they were such documents which the petitioner being Excise Inspector was very well aware of. The language and phraseology used in such documents was more or less stereotyped and the petitioner being familiar to these types of documents, his submission that he was not able to read these documents being carbon copies could not be accepted, as an excuse given for non submission of reply by the petitioner.

15. The gist of the charge against the petitioner was that he permitted removal and the dispatch of Rectified Spirit in the guise of Denatured spirit. The said spirit was dispatched from a distillery of which the petitioner was in charge at the relevant point of time and the tankers were intercepted in Andhra Pradesh by Officers of the Excise Department of that State. They took a sample of the contents of tankers and after chemical analysis of the sample it was found that the tanker contained Rectified spirit. The matter was brought to the notice of the officials of the U.P. Excise Department by the Officials of the Andhra Pradesh Excise Department and thereafter disciplinary proceedings were initiated.

16. By means of the initial enquiry report submitted by the Inquiry Officer, he had found charge no.2 as partially proved on the ground that Panchnamas were not produced before him. The said Panchnamas were subsequently produced before him and copies of the said documents were also supplied to the petitioner to file his objections thereon. Such Panchnamas being carbon copies of the originals may not be easily legible to a layman, but the petitioner, who was an Excise Inspector, being well conversant with the language used in such Panchnamas would certainly have been able to read them although with some strain on the eyes.

17. The Writ-Court has also observed that the Inquiry Officer at the initial stage had found that the charge no.2 could not be proved beyond reasonable doubt, which observation was wrong on the part of the Inquiry Officer, as the standard

of proof required for a finding of conviction in a criminal case, and in a departmental proceedings are different. Whereas in a criminal case, it is essential to prove a charge beyond a reasonable doubt, in a departmental proceedings only a preponderance of probability would serve the purpose for holding delinquent employee guilty of misconduct.

18. Counsel for the petitioner / appellant has vehemently argued on the basis of the certain paragraphs of the Excise Manual that the petitioner's duty was only to supervise the sealing of tankers and then issue Transit Passes. The petitioner / appellant was posted as an Officer In-charge at Nanauta, district Bijnor, and was liable for only proper sealing of the containers, in which the Spirit was transported and he was under no duty whatsoever for testing the quality of the spirit sent, which is the responsibility of the distillery. The petitioner has relied upon paragraph 811 of the U.P. Excise Manual, which says that all vessels or containers containing spirit shall be sealed by the Officer In-charge before issuance of a pass and has mentioned how the casks / vessels must be sealed, and the type of seals to be used for the said purpose.

19. On the basis of paragraph 811, it has been argued by the learned counsel for the petitioner / appellant that his duty being limited in nature, he could not have been charged with allegation of wrongly certifying the contents of the tankers as DeNatured Spirit instead of Rectified Spirit.

20. This Court has gone through the charge sheet and it is obvious that the petitioner had been found guilty of not maintaining records correctly and diligently as given in paragraphs 827 and 832 of the Excise Manual. It is the duty of the Excise Inspector In-charge of distillery to maintain the ledger for DeNatured spirit correctly under paragraph 827 of the Manual. All issue of spirit from the warehouse or spirit received in the DeNaturing room for DeNaturaion, had to be recorded in appropriate columns of the Register and amount taken for issue after DeNaturaion was also be recorded in the appropriate columns.

21. Similarly in paragraph 832 of the Excise Mannual, the duty of the Excise Inspector In-charge of distillery was to make correct entries with regard to all samples taken of all transactions. Not only was the petitioner as Excise Inspector In-charge of the distillery and responsible for issuance of Rectified Spirit, for its DeNaturaion, but also thereafter certifying that the process of DeNaturaion had actually taken place and the Rectified Spirit had been converted into DeNatured Spirit and thereafter to oversee the filling and sealing of the casks / tanker by which the said DeNatured Spirit was to be transported by the distillery and issuing Transit Passes for the same. Rectified Spirit in State of U.P. carries much higher Excise Duty than DeNatured Spirit. By certifying Rectified Spirit as DeNatured Spirit, the petitioner had intentionally caused great loss of Revenue to the Public Exchequer.

22. Similarly in paragraph 785 of the Excise Manual, it is provided that for the purpose of ascertaining that the Spirit had been DeNatured in the prescribed

manner, the Officer In-charge of the distillery shall on each occasion oversee that the Spirit is DeNaturised and samples should be taken and he had to get the same chemically analyzed in the distillery itself to determine that the Rectified Spirit had been completely DeNaturised.

23. The petitioner in his reply to the Inquiry Officer and to the show cause notice issued by the Appointing Authority said that only 0.2% Acetone was added to the Rectified Spirit to enable its DeNaturisation. The Appointing Authority has found on the basis of Expert opinion that the contention of the petitioner that only 0.2% Acetone was added for DeNaturisation of Rectified Spirit was liable to be rejected.

24. The Excise Commissioner, the Appointing Authority, while considering the reply of the petitioner to the charge sheet and to the show cause notice found that the explanation given by the petitioner that only 0.2% Acetone was added to Rectified Spirit and therefore, it could have been that the said Acetone was insufficient to DeNature the Rectified Spirit completely was unable to be rejected. The Excise Commissioner found that even if the petitioner's contention is taken to be true, at-least some quantity of 0.2% Acetone should have been found by the Chemical Analyst while analysing the samples taken from the tankers by the officials of Andhra Pradesh Excise Department. The Regional Research Laboratory in its report had completely ruled out any presence of Acetone in the samples.

25. Thus, the Excise Commissioner has found on basis of the Chemical Analyst Report that Acetone infact has not been added at all, and what was sent from the distillery at Nanauta by tankers to Karnataka was infact Rectified Spirit and not DeNaturised spirit and according by the petitioner being Excise Officer Incharge of the distillery concerned was held responsible for such act.

26. Learned counsel for the petitioner / appellant has argued that initially when dismissal order was issued on 1.11.1990, the petitioner had been granted an interim order on 19.11.1990 in said Writ Petition No. 30455 of 1990 staying the operation of the impugned order and directing that the petitioner be paid his salary. On the basis of said interim order the appellant had continued in service for almost seventeen years and subsequent to the passing of the order impugned in the writ petition, the petitioner had completed almost 54 years of age and therefore the dismissal of the writ petition by the Hon'ble Single Judge on 12.2.2007 caused undue hardship upon the petitioner.

27. It was also argued by the learned counsel for the petitioner that at the time of admission of the Special Appeal, this Court on 12.2.2007 had taken into account the interim order continuing during the pendency of the writ petition and had observed that since the petitioner / appellant had been continued in service for all those years, he would be allowed to continue till the disposal of the Appeal. On the basis of the said interim order, the petitioner worked till, he retired in the year 2013. It was therefore prayed that this Court may allow the Appeal and set aside the judgment and order dated 12.2.2007.

28. This Court has considered the argument of the appellant. No legitimate right can be claimed by any person who is dismissed but allowed to continue in service on the basis of an interim order. The Hon"ble Single Judge in the judgment and order dated 12.2.2007 has observed on the basis of various judgments of the Hon"ble Supreme Court viz, N. Mohonam Vs. State of Kerala & others AIR 1997 SC 1986; Bileshwar Khan Udyog Khedut Shahkari Mandali Ltd. Vs. Union of India & others AIR 1999 SC 1198 and South Eastern Coal Fields Ltd. Vs. State of Madhya Pradesh & others (2003) 8 SCC 648 and has held that the appointments / continuation in service on the basis of interim order does not create any legal right in favour of an employee.

29. This Court is in respectful agreement with the observations made by the Hon"ble Single Judge. The principle laid down in the aforesaid judgments have been reiterated by Hon"ble Supreme Court in the case of State of Orissa Vs. Mamata Mohanti 2011 (3) SCC 436. Moreover, the Hon"ble Supreme Court in Grindlays Bank Ltd. Vs. Income Tax Officer 1980 (2) SCC 191 has observed that the simple fact of institution of litigation by itself should not be permitted to confer an advantage on the party responsible for it. If the writ petition is eventually dismissed by the High Court, the advantage derived out of an interim order cannot be allowed to continue in favour of the litigant. It is an advantage which the litigant seeks to derive by mere circumstance of his filing a writ petition and should be nullified when Court passes the final order.

30. The Supreme Court has further in Amarjeet Singh & others Vs. Devi Ratan & others 2010 (1) SCC 417 considered the question as to whether the appellants should be asked to suffer only because of an interim order passed by the Court in a case having no merit at all. The Court has observed in paragraphs 17 to 24 thus:-

17. No litigant can derive any benefit from mere pendency of case in a Court of Law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting interim order and thereafter blame the Court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim "Actus Curiae neminem gravabit", which means that the act of the Court shall prejudice no-one, becomes applicable in such a case. In such a fact situation the Court is under an obligation to undo the wrong done to a party by the act of the Court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralised, as institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the Court. (Vide Shiv Shankar & Ors. Vs. Board of Directors, Uttar Pradesh State Road Transport Corporation & Anr., 1995 Suppl. (2) SCC 726; M/s. GTC Industries Ltd. Vs. Union of India & Ors., AIR 1998 SC 1566; and Jaipur Municipal Corporation Vs. C.L. Mishra, (2005) 8 SCC

18. In *Ram Krishna Verma & Ors. Vs. State of U.P. & Ors.*, AIR 1992 SC 1888 this Court examined the similar issue while placing reliance upon its earlier judgment in *Grindlays Bank Limited Vs. Income Tax Officer, Calcutta & Ors.*, AIR 1980 SC 656 and held that no person can suffer from the act of the Court and in case an interim order has been passed and petitioner takes advantage thereof and ultimately the petition is found to be without any merit and is dismissed, the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralized.

19. In *Mahadeo Savlaram Sheke & Ors. Vs. Pune Municipal Corporation & Anr.*, (1995) 3 SCC 33, this Court observed that while granting the interim relief, the Court in exercise of its discretionary power should also adopt the procedure of calling upon the plaintiff to file a bond to the satisfaction of the Court that in the event of his failing in the suit to obtain the relief asked for in the plaint, he would adequately compensate the defendant for the loss ensued due to the order of injunction granted in favour of the plaintiff. Even otherwise the Court while exercising its equity jurisdiction in granting injunction is also competent to grant adequate compensation to mitigate the damages caused to the defendant by grant of injunction. The pecuniary award of damages is consequential to the adjudication of the dispute and the result therein is incidental to the determination of the case by the Court. The Court can do so in exercise of its inherent jurisdiction in doing *ex debito justitiae* mitigating the damage suffered by the defendant by the act of the Court in granting injunction restraining the defendant from proceeding with the action complained of in the suit. Such a procedure is necessary as a check on abuse of the process of the Court and adequately compensate the damages or injury suffered by the defendant by act of the Court at the behest of the plaintiff.

20. In *South Eastern Coalfields Ltd. Vs. State of M.P. & Ors.*, AIR 2003 SC 4482, this Court examined this issue in detail and held that no one shall suffer by an act of the Court. The factor attracting applicability of restitution is not the act of the court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences.

21. The Court further held :

"28.....Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are later to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated....."

22. Similarly in *Karnataka Rare Earth & Anr. Vs. Senior Geologist, Department of Mines & Geology & Anr.*, (2004) 2 SCC 783, a similar view has been reiterated by this Court observing that the party who succeeds ultimately is to be placed in the same position in which they would have been if the Court would not have passed an interim order.

23. In *A.R. Sircar Vs. State of U.P. & Ors.*, (1993) Supp. 2 SCC 734, the dispute arose regarding the seniority of direct recruits and promotees on the post of Professor of Medicine in a medical college. The appellant therein faced the selection process for direct appointment along with the respondents who had been working on the said post on ad hoc basis. The appellant was duly selected, however, the private respondents could not succeed. The respondents filed the writ petition before the High Court and precluded the appointment of appellant pursuant to his selection, by obtaining the interim order and on the other hand they got their ad hoc promotion to the post regularized under the rules. The appellant could succeed in obtaining the appointment only after dismissal of the writ petition against him after several years of his selection. This Court held that in addition to the relief under the statutory provisions the appellant was entitled in equity to get the seniority over the respondents as they succeed in precluding his appointment to the post by obtaining an interim order in a case having no merits whatsoever.

23. In *Arya Nagar Inter College Vs. Sree Kumar Tiwari* 1997 (4) SCC 388, the services of the respondent therein were terminated, however, he continued to be in service on the basis of interim order passed by the High Court in the writ petition filed by him. During the pendency of the writ petition, the rules for regularization of ad hoc appointees were amended and in pursuance thereof his services also stood regularized. Ultimately, the writ petition filed by the respondent was dismissed. This Court held that his continuity in service and regularization had to be understood as it was subject to the result of the writ petition. As the writ petition was dismissed the order of regularising of his services, passed during the pendency of the writ petition, became inoperative.

31. The petitioner has been allowed to work on the basis of interim order initially granted by this Court staying the order of dismissal, which interim order merged in the final order of dismissal of the writ petition. Again, this Court was pleased to grant an interim order in March 2007 and on the basis thereof the petitioner has continued in service as Excise Inspector and had retired sometime in the year 2013.

32. Having worked on the basis of interim order, the petitioner cannot claim any legitimate right. However, this Court in a Full Bench decision rendered in the case of Suryadev Mishra Vs. State of U.P. 2006 (2) ALJ 1 has held that in case an employee has worked on the basis of interim order, the salary paid to him cannot be recovered, the relevant paragraph of the judgment rendered by the Full Bench of this Court is being quoted herein below:-

"24. In the result the answers to the questions formulated for decisions by us are as follows;

1. The petitioner is entitled to the salary for the period that he has worked under the interim order of the Court in view of the law laid down in Shobh Nath ""'s case which has now been overruled. We have therefore, modified the order passed in the first petition.

2. Where a writ petition in which interim orders were granted is dismissed without any reference to the salary for the period that the petitioner had worked under the interim orders of the Court, a second writ petition for claiming the salary of the same period is not maintainable. However, it may be maintainable to quash any subsequent illegal order regarding payment of post retirement benefit, as it would be a fresh cause of action."

33. Thus, the petitioner / appellant may not be asked to return the salary and allowances paid to him. However, we have not found any legal or factual infirmity in the order impugned. The Special Appeal is dismissed. The order of the Hon"ble Single Judge dated 12.2.2007 is affirmed.

34. As a consequence of dismissal of this Special Appeal and upholding of the order of dismissal from service dated 1.11.1990, which entails forfeiture of all benefits of service viz, pension and gratuity etc; no such benefit shall be available to the petitioner. Recovery however of salary and allowances already paid to the petitioner by the department shall not be made.